Muraly a/l Varataa Raju v Allianz General Insurance Co (M) Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCvC-624–12 OF 2018
WONG KIAN KHEONG J
29 OCTOBER 2019

Civil Procedure — Striking out — Application for — Plaintiff obtained interlocutory judgment and subsequently final judgment in relation to liability suit — Plaintiff filed recovery action — Defendant applied to strike out recovery action — Whether defendant bound under s 96(1) of the Road Transport Act 1987 to satisfy final judgment — Whether plaintiff should apply for substitution of deceased with representative — Whether plaintiff breached mandatory provision of O 15 r 7(2) of the Rules of Court 2012 — Whether deceased's representative was denied right to be heard — Whether plaintiff breached second rule of natural justice — Whether recovery action frivolous, vexatious and constituted abuse of court's process — Rules of Court O 15 r 7(2), O 18 r 19(1)(b),(d) & O 92 r 4

Road Traffic — Insurance — Judgment sum — Plaintiff obtained interlocutory judgment and subsequently final judgment in relation to liability suit — Plaintiff filed recovery action — Defendant applied to strike out recovery action — Evidential value to be attached on JPJ's record (Car Insurance) under s 117 of the RTA — Whether defendant bound under s 96(1) of the Road Transport Act 1987 to satisfy final judgment — Road Transport Act 1987 ss 96 & 117

The defendant insurance company ('the defendant') had issued an insurance policy to the deceased regarding a 'Perodua Kancil' with the registration No TY3162 on 26 February 2014, nevertheless, the said policy was cancelled by the deceased on 28 October 2014 as the vehicle had been sold. Problem arose when an accident occurred between a motorcycle ridden by the plaintiff and a 'Toyota Hilux' car with the registration No TY3162 ('the Toyota car') driven by Mr Mathialagan a/l Chandrahasan ('Mathialagan'). Based on a search conducted by the plaintiff in the records of 'Jabatan Pengangkutan Jalan' ('JPJ's record'), the deceased was the owner of car No TY3162 whereas the defendant was the insurer of the said car. It ought to be noted that the records did not mention the model of Car No TY3162. The plaintiff subsequently filed the liability suit against Mathialagan and the deceased. However, after the filing of the suit, the deceased passed away. In the liability suit, the plaintiff obtained interlocutory judgment in the sessions court ('the SC') against the defendants; and after the SC had conducted an assessment of the damages, the SC gave final

judgment against the defendants for, inter alia, damages amounting to RM221,532; interest at certain rates for specified periods of time for general damages and special damages; and costs in a sum of RM14,108.05. The plaintiff then filed an action against the defendant pursuant to s 96 of the Road Transport Act 1987 ('the RTA') to recover the final judgment against the defendant ('the recovery action'). In response, the defendant filed the present application ('encl 7') to strike out the recovery action. The issues to be determined were: (a) what was the evidential value to be attached to JPJ's record ('car insurance') under s 117 of the RTA; and (b) whether the defendant was bound under s 96(1) of the RTA to satisfy the final judgment: (i) in view of the cancellation pursuant to s 96(2)(c)(i) of the RTA; and/or (ii) when the interlocutory judgment and the final judgment were not valid against the deceased because upon the death of the deceased: (1) the plaintiff should have applied to SC to substitute the deceased with a representative of the deceased under the mandatory provision of O 15 r 7(2) of the Rules of Court 2012 ('the ROC'); and (2) in accordance with the second rule of natural justice, the deceased's representative had a right to be heard in the liability suit before the plaintiff obtained the interlocutory judgment and final judgment.

Held, allowing encl 7 with costs:

(1) Section 117 of the RTA did not apply to JPJ's record. There was nothing in the RTA which provided for the conclusiveness of any record of the JPJ. Therefore, the plaintiff could not rely on s 117 of the RTA to persuade the court to attach any evidential value to the JPJ's record (see paras 12–17).

(2) The court could not attach any weight to the JPJ's record (car insurance) due to the following evidence and reasons: (a) the defendant had adduced documentary evidence regarding the cancellation of the policy; (b) the plaintiff was not in a position to deny or dispute the truth of the contents of the documents; (c) the plaintiff could not rely on JPJ's record (car insurance) which did not state the model of car No. TY3162; and (d) JPJ had not verified the truth of the contents of JPJ's record (car insurance) (see para 18).

(3) In respect of s 96(2)(c)(i) of the RTA, an insurer was not liable under s 96 of the RTA when the following two matters were present ('the two prerequisites'): (a) before the happening of the event which gave rise to the liability of an insured under an insurance policy ('the insured event), the policy was cancelled by mutual consent; and (b) before the happening of the insured event: (i) the insurance certificate ('insurance certificate') had been surrendered to the insurer; or (ii) the person to whom the policy was delivered made a statutory declaration stating that the insurance certificate had been lost or destroyed. In the present case, based on the evidence, the court was satisfied that the defendant had discharged the

evidential onus under s 103 of the Evidence Act 1950 to successfully prove the existence of the two prerequisites. On this ground alone, encl 7 should be allowed with costs pursuant to s 96(2)(c)(i) of the RTA (see paras 21–25).

(4) If an action has been filed and a plaintiff or defendant dies during the pendency of the action, O 15 r 7(2) of the ROC is applicable. O 15 r 7(2) of the ROC is a mandatory provision. In the present case, the plaintiff failed to substitute the deceased with either a representative or an executor/administrator of the deceased. By such failure, the plaintiff had deprived the representative or executor/administrator of the deceased their right to be heard. The plaintiff had breached the mandatory provisions of O 15 r 7(2) of the ROC and the second rule of natural justice by proceeding to obtain the interlocutory judgment and final judgment. As such, the interlocutory judgment and final judgment were not valid against the deceased. Based on the above findings, the defendant was therefore not liable under s 96(1) of the RTA to satisfy the final judgment (see paras 29–30, 33–34, 36 & 39–40).

(5) Based on the above evidence and reasons, the court found that the recovery action was frivolous and/or vexatious within the meaning of O 18 r 19(1)(b) of the ROC; and/or constituted an abuse of court process under O 18 r 19(1)(d), O 92 r 4 of the ROC and/or the court's inherent jurisdiction (see para 41).

[Bahasa Malaysia summary

Syarikat insurans defendan ('defendan') telah mengeluarkan polisi insurans kepada si mati berkenaan dengan 'Perodua Kancil' dengan nombor pendaftaran TY3162 pada 26 Februari 2014, namun polisi tersebut telah dibatalkan oleh si mati pada 28 Oktober 2014 kerana kenderaan tersebut telah dijual. Masalah timbul apabila berlaku kemalangan antara motosikal yang ditunggang oleh plaintif dan kereta 'Toyota Hilux' dengan nombor pendaftaran TY3162 ('kereta Toyota') yang dipandu oleh Encik Mathialagan a/l Chandrahasan ('Mathialagan'). Berdasarkan carian yang dilakukan oleh plaintif dalam rekod 'Jabatan Pengangkutan Jalan' ('rekod JPJ'), si mati adalah pemilik kereta No TY3162 manakala defendan adalah penanggung insurans kereta tersebut. Harus diingat bahawa rekod tersebut tidak menyatakan jenis bagi kereta No TY3162. Plaintif kemudiannya memfailkan saman liabiliti ke atas Mathialagan dan si mati. Bagaimanapun, setelah memfailkan saman tersebut, si mati meninggal dunia. Dalam saman liabiliti, plaintif memperoleh penghakiman interlokutori di mahkamah sesyen ('MS') terhadap defendan; dan setelah MS melakukan penilaian ganti rugi, MS memberikan penghakiman muktamad terhadap defendan bagi, antara lain, ganti rugi berjumlah RM221,532; faedah pada kadar tertentu untuk jangka masa tertentu untuk ganti rugi am dan ganti rugi khas; dan kos berjumlah RM14,108.05. Plaintif kemudian mengemukakan tuntutan terhadap

defendan menurut s 96 Akta Pengangkutan Jalan 1987 ('APJ') untuk mendapatkan jumlah penghakiman muktamad terhadap defendan ('tindakan pemerolehan'). Bertindak balas kepada tindakan tersebut, defendan telah memfailkan permohonan semasa ('lampiran 7') untuk membatalkan tindakan pemerolehan. Isu-isu yang perlu ditentukan adalah: (a) berapa pemberatan nilai keterangan yang harus diberikan pada rekod JPJ (insurans kereta) berdasarkan s 117 APJ; dan (b) sama ada defendan terikat di bawah s 96(1) APJ untuk memenuhi penghakiman muktamad: (i) memandangkan terdapat pembatalan menurut s 96(2)(c)(i) APJ; dan/atau (ii) apabila penghakiman interlokutori dan penghakiman muktamad adalah tidak sah terhadap si mati kerana semasa kematian si mati: (1) plaintif seharusnya memohon kepada MS untuk menggantikan si mati dengan wakil si mati di bawah peruntukan mandatori A 15 k 7(2) Kaedah-Kaedah Mahkamah 2012 ('KKM'); dan (2) sesuai dengan prinsip keadilan natural yang kedua, wakil si mati berhak didengar dalam saman liabiliti sebelum plaintif memperoleh penghakiman interlokutori dan penghakiman muktamad.

Diputuskan, membenarkan lampiran 7 dengan kos:

(1) Seksyen 117 APJ tidak terpakai ke atas rekod JPJ. Tidak ada apa-apa dalam APJ yang menyatakan kesahihan bagi apa-apa rekod JPJ. Oleh itu, plaintif tidak boleh bergantung kepada s 117 APJ untuk meyakinkan mahkamah untuk memberikan nilai keterangan ke atas rekod JPJ (lihat perenggan 12–17).

(2) Mahkamah tidak dapat memberikan pemberatan ke atas rekod JPJ (insurans kereta) berdasarkan keterangan dan alasan berikut: (a) defendan telah mengemukakan keterangan dokumentari mengenai pembatalan polisi; (b) plaintif tidak dapat menyangkal atau mempertikaikan kebenaran kandungan dokumen; (c) plaintif tidak boleh bergantung pada rekod JPJ (insurans kereta) yang tidak menyatakan model kereta No. TY3162; dan (d) JPJ tidak mengesahkan kesahihan kandungan rekod JPJ (insurans kereta) (lihat perenggan 18).

(3) Berkenaan dengan s 96(2)(c)(i) APJ, penanggung insurans tidak bertanggungjawab di bawah s 96 APJ apabila terdapat dua perkara berikut ('dua prasyarat'): (a) sebelum berlakunya peristiwa yang menimbulkan tanggungjawab seseorang yang diinsuranskan di bawah polisi insurans ('kejadian yang diinsuranskan'), polisi tersebut dibatalkan dengan persetujuan bersama; dan (b) sebelum berlakunya kejadian yang diinsuranskan: (i) sijil insurans ('sijil insurans') telah diserahkan kepada penanggung insurans; atau (ii) orang yang diserahkan polisi tersebut membuat pernyataan berkanun yang menyatakan bahawa sijil insurans telah hilang atau musnah. Dalam kes semasa, berdasarkan keterangan, mahkamah berpuas hati bahawa defendan telah melepaskan beban pembuktian di bawah s 103 Akta Keterangan 1950 untuk membuktikan

kewujudan dua prasyarat tersebut. Atas dasar ini saja, lampiran 7 harus dibenarkan dengan kos berdasarkan s 96(2)(c)(i) APJ (lihat perenggan 21–25).

(4) Jika sesuatu tindakan telah difailkan dan seorang plaintif atau defendan meninggal dunia semasa tindakan berlangsung, A 15 k 7(2) KKM adalah terpakai. Aturan 15 k 7(2) KKM adalah peruntukan mandatori. Dalam kes semasa, plaintif gagal menggantikan si mati dengan wakil atau pelaksana/pentadbir si mati. Dengan kegagalan tersebut, plaintif telah menafikan hak wakil atau pelaksana/pentadbir si mati untuk didengar. Plaintif telah melanggar peruntukan mandatori A 15 k 7(2) KKM dan prinsip kedua keadilan natural dengan meneruskan untuk mendapatkan penghakiman interlokutori dan penghakiman muktamad. Oleh itu, penghakiman interlokutori dan penghakiman muktamad tersebut adalah tidak sah terhadap si mati. Berdasarkan dapatan-dapatan di atas, defendan tidak bertanggung jawab di bawah s 96(1) APJ untuk memenuhi penghakiman muktamad (lihat perenggan 29–30, 33–34, 36 & 39–40).

(5) Berdasarkan keterangan dan alasan-alasan di atas, mahkamah mendapati bahawa tindakan pemerolehan adalah semberono dan/atau menjengkelkan dalam maksud A 18 k 19(1)(b) KKM; dan/atau merupakan penyalahgunaan proses mahkamah di bawah A 18 k 19(1)(d), A 92 k 4 KKM dan/atau bidang kuasa sedia ada mahkamah (lihat perenggan 41).]

Cases referred to

Government Of Malaysia & Anor v Taib Bin Abdul Rahman [1991] 2 MLJ 174, SC (folld)

Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301; [2015] 8 CLJ 1, FC (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, FC (refd)

Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal [2015] 6 MLJ 492, FC (refd)

Teo Gim Tiong v Krishnasamy Pushpavathi (legal representative of the estate of Maran s/o Kannakasabai, deceased) [2014] 4 SLR 15, CA (refd)

The Pacific Insurance Berhad v Tharmaseelan Mulri Trans Service & Ors [2019] MLJU 1886, HC (refd)

Toh Seow Ngan & Ors v Toh Seak Keng & Ors [1990] 2 MLJ 303, SC (refd)

Legislation referred to

Evidence Act 1950 s 103

National Land Code s 89

Probate and Administration Act 1959 s 2

Road Transport Act 1987 ss 10(1), 11(1)(c), 96, 96(1), (2), (2)(a), (2)(b),

(2)(c), (2)(c)(i), (3), 117, 117(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11)
Rules of Court 2012 O 15 rr 6A, 6A(1), (3), 7(1), (2), 9(1), O 18 r 19(1)(b), (1)(d), O 92 r 4
Rules of Court [SG] O 15 r 7(2)
Subordinate Courts Rules 1980 O 8 r 7(2)

Edwin Lewis (Pang Tek Kit with him) (Edwin Lewis) for the plaintiff.
Muhammad Arif bin Azmi (Kanaga, Suresh & Co) for the defendant.

Wong Kian Kheong J:

BACKGROUND

[1] On 26 February 2014, the defendant insurance company ('the defendant') issued an insurance policy ('policy') to Mr Anzpazhakan a/l Rethinam ('the deceased') regarding a 'Perodua Kancil' car with the registration No TY3162 ('Perodua car').

[2] The deceased cancelled the policy on 28 October 2014 on the ground that the Perodua car had been sold ('cancellation (policy)').

[3] On 26 December 2014, there was an accident at Hutan Melintang, Perak ('accident') which involved:

(a) a motorcycle ('motorcycle') ridden by the plaintiff ('the plaintiff'); and

(b) a 'Toyota Hilux' car with the registration No TY3162 ('Toyota car') driven by Mr Mathialagan a/l Chandrahasan ('Mathialagan'). The description of the Toyota car had been pleaded by the plaintiff in para 2 of the plaintiff's statement of claim ('plaintiff's SOC (liability suit')) in Suit No A53KJ-598–10–15 ('liability suit') filed by the plaintiff in Klang Sessions Court ('SC'). I will elaborate on the liability suit subsequently in this judgment.

[4] The plaintiff conducted a search of the records of 'Jabatan Pengangkutan Jalan' ('JPJ') regarding a car with the registration No TY3162 ('car No TY3162') and JPJ's 'Maklumat Insurans Kenderaan' (JPJ's record (car insurance)) stated that:

(a) the deceased was the owner of car No TY3162; and

(b) the defendant was the insurer of car No TY3162 from 26 February 2014 to 25 February 2015.

It should be highlighted that the JPJ's record (car insurance) did not state the

model of car No TY3162, be it the Perodua car or Toyota car.

[5] The plaintiff had filed the liability suit in SC on 1 October 2015 and claimed for damages for his personal injuries and damage to the motorcycle which had been caused by the accident. The liability suit had been instituted against:

(a) Mathialagan as the driver of car No TY3162; and

(b) the deceased as the owner of car No TY3162.

I will refer to Mathialagan and the deceased collectively as the 'defendants (liability suit)' in this judgment.

[6] After the filing of the liability suit, the deceased passed away on 14 December 2015.

[7] In the liability suit:

(a) the plaintiff obtained interlocutory judgment in SC against the defendants (liability suit) ('interlocutory judgment (liability suit)'); and

(b) after SC had conducted an assessment of the damages to be paid by the defendants (liability suit) to the plaintiff, SC gave final judgment against the defendants (liability suit) as follows, among others ('final judgment (liability suit)'):

(i) damages amounting to RM221,532;

(ii) interest at certain rates for specified periods of time for general damages and special damages; and

(iii) costs in a sum of RM14,108.05.

[8] The plaintiff has filed this suit ('recovery action') against the defendant pursuant to s 96 of the Road Transport Act 1987 ('the RTA') to recover the final judgment (liability suit) against the defendant.

[9] The defendant has filed an application in court encl No 7 to strike out the recovery action ('encl 7').

ISSUES RAISED IN ENCL 7

[10] The following questions arise in encl 7 for the determination of this court:

(a) what is the evidential value to be attached to JPJ's record (car insurance) under s 117 of the RTA? My research is not able to reveal any Malaysian

case which has construed s 117 of the RTA regarding JPJ's record (car insurance); and

(b) whether the defendant is bound under s 96(1) of the RTA to satisfy the final judgment (liability suit):

(i) in view of the cancellation (policy) pursuant to s 96(2)(c)(i) of the RTA; and/or

(ii) when the interlocutory judgment (liability suit) and final judgment (liability suit) are not valid against the deceased because upon the death of the deceased:

(1) the plaintiff should have applied to SC to substitute the deceased with a representative of the deceased under the mandatory provision of O 15 r 7(2) of the Rules of Court 2012 ('the RC'). In this regard, there are conflicting views on O 15 r 7(2) of the RC by our Supreme Court and Singapore's Court of Appeal; and

(2) in accordance with the second rule of natural justice, the deceased's representative had a right to be heard in the liability suit before the plaintiff obtained the interlocutory judgment (liability suit) and final judgment (liability suit).

WHAT WEIGHT TO BE ATTACHED TO JPJ'S RECORD (CAR INSURANCE)?

[11] Section 117 of the RTA provides as follows:

117 Provisions as to evidence.

(1) *A registration certificate shall be prima facie evidence of the registration of the motor vehicle referred to therein, and of the particulars appearing in the register relating to such motor vehicle and the registered owner thereof.*

(2) *A copy of any entry in any register required to be kept under this Act, purporting to be signed by or on behalf of the person who, under this Act, is required to keep such register, and certified by or on behalf of such person to be a true copy thereof, shall be evidence of the matters stated in that entry without proof of the signature or authority of the person signing the said entry or the said certificate.*

(3) When in any proceedings for an offence against this Act it is necessary to prove —

(a) that a motor vehicle was, or was not, registered in the name of any person;

(b) that any person was, or was not, the registered owner of a motor vehicle; or

(c) that any person was, or was not, the holder of a licence granted under Part II,

a certificate purporting to be signed by a Director, Deputy Director or licensed registrar and certifying the matters aforesaid shall be admissible as evidence, and shall constitute prima facie proof of the facts certified in such certificate, without proof of the signature of the Director, Deputy Director or licensed registrar to such certificate.

(4) When in any proceedings for an offence against this Act it is necessary to prove —

(a) that a motor vehicle was, or was not, an authorized vehicle; or

(b) that any person is a road transport officer,

a certificate purporting to be signed by the Director General, and certifying as to the matters aforesaid, shall be admissible as evidence, and shall constitute prima facie proof of the facts certified in such certificate, without proof of the signature of the Director General to such certificate.

(5) When in any proceedings for an offence against this Act, any question arises as to the damage or extent of damage caused to a motor vehicle as a result of an accident or whether a motor vehicle does, or does not, comply with any provision of this Act relating to the construction, equipment or conditions of use of such motor vehicle, the certificate of a road transport officer or any person licensed under this Act that he has examined the motor vehicle and the result of such examination shall be admissible in evidence, and shall be sufficient prima facie evidence of any fact or opinion stated therein relating to the construction, equipment or conditions of use of such motor vehicle, and the officer or the person licensed under this Act may not be called for cross-examination on the certificate unless contrary evidence is given which appears to the court to be credible, or unless for any reason the court considers cross-examination to be necessary or desirable in the interest of justice:

Provided that in any case in which the prosecution intends to give in evidence of any such certificate there shall be delivered to the defendant a copy thereof not less than ten clear days before the commencement of the trial.

(6) When in any proceedings it is necessary to prove the weight unladen or laden of any vehicle, or the weight of any load carried on any vehicle, or the weight carried on any axle of the vehicle, a certificate purporting to be signed by —

(a) any police officer authorized in writing in that behalf by a Chief Police Officer or Commissioner of Police;

(b) any road transport officer authorized in writing in that behalf by the Director General;

(c) any officer of the Public Works Department authorized in writing in that behalf by the Director General of Public Works or the State Director of Public Works, or any officer of the Highway Authority Malaysia authorized in writing in that behalf by the Director General of Highway Authority Malaysia;

(d) any traffic warden authorized in writing in that behalf by the Dato Bandar or the Perbadanan Putrajaya;

(e) any officer of a port authority authorized in writing in that behalf by the General Manager of the port authority;

(f) any person licensed under this Act,

to operate the weigh-bridge or weighing machine on which the said vehicle or load was weighed, and certifying —

(aa) that such weigh-bridge or weighing machine had been examined within the previous six months and found to be accurate by the Inspector of Weights and Measures; and

(bb) the weight of such vehicle or load, shall be accepted by any court as prima facie proof of the facts certified in such certificate.

(7) When in any proceedings before any court it is necessary to prove that any police officer, the Director General, any Director, any road transport officer, any public servant, any person licensed under this Act or any traffic warden has sent or served, or has received or has not received, any badge, document, licence, notice, plate or other thing, a certificate purporting to be signed by or on behalf of such police officer, Director General, Director, road transport officer, public servant, any person licensed under this Act or traffic warden and certifying the sending, service, reception or non-reception of such badge, document, licence, notice, plate or thing, shall be admissible as evidence, and shall constitute prima facie proof of the facts certified in such certificate, without proof of the signature to such certificate.

(8) In any proceedings in any court, particulars of a conviction endorsed on a driving licence granted under Part II may be produced as prima facie evidence of the conviction.

(9) Where in any proceedings for an offence against this Act it is necessary to prove that a helmet is or is not a protective helmet, or a seat-belt is or is not a safety seat-belt, prescribed under the rules made under this Act, a certificate purporting to be signed by the Director or any officer of the Standards and Industrial Research Institute of Malaysia shall be admissible as evidence, and shall constitute prima facie proof of any fact or opinion stated therein, without proof of the signature of the said Director or officer to such certificate, and neither the Director nor any officer of the Standards and Industrial Research Institute of Malaysia shall be called for cross-examination on the certificate unless for any reason the court considers the cross-examination to be necessary or desirable in the interest of justice.

(10) When in any proceedings it is necessary to prove the speed of any vehicle, a certificate purporting to be signed by any public servant who is an electrical engineer or a mechanical engineer and certifying that any equipment used for determining the speed of vehicles had been examined within the previous eight months and found to be accurate shall be accepted by any court as prima facie proof of the facts certified in such certificate and such public servant shall not be called for cross-examination on the certificate unless for any reason the court considers the cross-examination to be necessary or desirable in the interest of justice.

(11) In any proceedings in any court, any recorded image tendered by the prosecution for any offence under this Act shall be admissible as evidence, and shall constitute prima facie proof of any fact stated therein. (Emphasis added.)

[12] Firstly, sub-ss (3)–(5) and (9) of s 117 of the RTA concern proceedings for offences under RTA and do not apply to JPJ's record (car insurance).

[13] Secondly s 117(6)–(8), (10) and (11) of the RTA do not concern JPJ's record (car insurance).

[14] Thirdly, JPJ's record (car insurance) is not a 'registration certificate' within the meaning of ss 10(1), 11(1)(c) and 117(1) of the RTA. Sections 10(1) and 11(1)(c) of the RTA state as follows:

> 10 *Applications for registration*
>
> (1) *Every application for the registration of a motor vehicle shall be made in the prescribed form to the Director of a registration area and shall be signed by the person for the time being entitled to the possession of the motor vehicle.*
>
> ...
>
> 11(1) *Upon the registration of a motor vehicle, the Director shall —*
>
> ...
>
> (c) *issue to that person a registration certificate in the prescribed form*. (Emphasis added.)

[15] Fourthly, s 117(2) of the RTA does not apply to JPJ's record (car insurance) because:

(a) JPJ's record (car insurance) is not a copy of any entry in any register required to be kept under RTA ('JPJ's Register') which had been signed by or on behalf of the person who, under RTA, is required to keep JPJ's Register ('JPJ officer'); and

(b) JPJ's record (car insurance) has not been certified by JPJ officer to be a true copy of an entry in JPJ's Register.

[16] Fifthly, there is nothing in RTA which provides for the conclusiveness of any record of JPJ. This is unlike s 89 of the National Land Code ('the NLC') which provides for the conclusiveness of the 'Register Document of Title' regarding, among others, titles to land and interest in land. Section 89 of the NLC provides as follows:

> 89 Conclusiveness of register documents of title
>
> Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence —
>
> (a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and

(b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified to referred to in that document. (Emphasis added.)

[17] Premised on the above reasons, the plaintiff cannot rely on s 117 of the RTA to persuade this court to attach any evidential value to JPJ's record (car insurance).

[18] In any event, I cannot attach any weight to JPJ's record (car insurance) due to the following evidence and reasons:

(a) the defendant has adduced the following documentary evidence regarding the cancellation (policy) ('documents (cancellation of policy)'):

(i) the deceased signed a form provided by the defendant ('the defendant's form'). In the defendant's form, among others:

(1) there was the deceased's own handwriting;

(2) the deceased requested a cancellation of the policy with effect from 28 October 2014 on the ground that the deceased had sold the Perodua car; and

(3) the deceased ticked on the relevant boxes that the deceased had surrendered the original policy to the defendant and had submitted a photocopy of the deceased's Identity Card to the defendant;

(ii) the deceased had given details of the deceased's bank savings account in the defendant's 'E-Payment Form';

(iii) (iii) the defendant had endorsed on the policy regarding the cancellation (policy); and

(iv) (the defendant had notified JPJ online in respect of the cancellation (policy) and this was evident from the document entitled 'JPJ Cover Note Enquiry';

(b) the plaintiff is not in a position to deny or dispute the truth of the contents of the documents (cancellation of policy);

(c) JPJ's record (car insurance) did not state the model of car No TY3162. The policy covered the deceased's Perodua car with the registration No TY3162. According to the plaintiff's SOC (liability suit), a Toyota car bearing registration No TY3162 was involved in the accident. It is trite law that the plaintiff is bound by his own pleading in the plaintiff's SOC (liability suit) — please see Federal Court's judgment delivered by Azahar Mohamed FCJ (as he then was) in *Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal* [2015] 6 MLJ 492 at para [41].

Based on the plaintiff's SOC (liability suit), a Toyota car bearing registration No TY3162 was involved in the accident. The defendant only insured a Perodua car with the registration No TY3162. I am of the view that the plaintiff could not rely on JPJ's record (car insurance) which did not state the model of car No TY3162; and

(d) on JPJ's record (car insurance), there was a stamp from JPJ which reminded that, among others, the contents of JPJ's record (car insurance) were based on information submitted to JPJ. It is clear that JPJ had not verified the truth of the contents of JPJ's record (car insurance).

CONDITIONS FOR LIABILITY OF INSURERS UNDER S 96 OF THE RTA

[19] Section 96(1) and (2) RTA provide as follows:

96 Duty of insurers to satisfy judgements against persons insured in respect of third party risks

(1) *If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements*.

(2) *No sum shall be payable by an insurer under subsection (1)* —

(a) in respect of any judgement, unless before or within seven days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the proceedings;

(b) in respect of any judgement, so long as execution is stayed pending an appeal; or

(c) *in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either* —

(i) *before the happening of the said event the certificate was surrendered to the insurer* or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the

person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate. (Emphasis added.)

[20] It is decided in *The Pacific Insurance Berhad v Tharmaseelan Mulri Trans Service & Ors* [2019] MLJU 1886 at para [6], as follows:

[6] *I am of the view that an insurer is bound under s 96(1) RTA to pay a person who has died or who has suffered bodily injury in a motor accident (Victim) if all of the following eight conditions are fulfilled*:

(1) the insurer 'must' be an 'authorized insurer' within the meaning of s 89 read with s 91(1)(a) RTA ('1st Condition');

(2) the insurer 'must' insure the insured 'in respect of any liability which may be incurred by [the insured] in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle' and the policy does not cover any of the matters stated in proviso (aa) to (cc) of s 91(1) RTA — please see ss 91(1)(b) and 96(1) RTA (2nd Condition);

(3) a certificate of insurance in the prescribed form and which contains prescribed particulars has been delivered by the insurer to the insured - please see ss 91(4) and 96(1) RTA (3rd Condition);

(4) the insured has caused death or bodily injury to the Victim by or arising out of the use of a motor vehicle or implement drawn thereby on a road — please see ss 91(1)(b) and 96(1) RTA (4th Condition);

(5) the Victim has filed a suit against the insured in respect of liability covered by the policy (Liability Suit) — please see s 96(1) RTA (5th Condition);

(6) *the circumstances provided in s 96(2)(a) to (c) RTA are not present (6th Condition)*;

(7) *the Victim has obtained a judgment against the insured in the Liability Suit — please see s 96(1) RTA (7th Condition). In Ramli bin Samad v Pacific & Orient Insurance Co Sdn Bhd* [2010] 3 MLJ 23 *at [61] and [62], Abdul Malik Ishak JCA decided as follows in the Court of Appeal*:

[61] *Finally, an insurance company like Pacific & Orient Insurance Co Sdn Bhd only indemnifies the insured like the second defendant employer when there is a judgment against the insured. Here, since no judgment was obtained against the second defendant employer as the insured, there is nothing for the insurer to indemnify. The duty of an insurer to satisfy judgment is set out in s 96(1) [RTA] ...*

...

[62] *Thus, any action against Pacific & Orient Insurance Co Sdn Bhd — the respondent herein, must be dismissed forthwith*. (Emphasis added.)

If a Victim has obtained a judgment in the Liability Suit against the insured, the Victim need not file a suit against the insurer (Recovery Suit) and obtain judgment against the insurer in the Recovery Suit — please see the judgment of Ramly Ali JCA (as he then was) in the Court of Appeal in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2011] 1 CLJ 947, at [21]; and

(8) *the insurer has not obtained a declaration from the court that the insurance is void or unenforceable — please see* s 96(3) of the RTA (8th Condition). (Emphasis added.)

WHETHER CANCELLATION (POLICY) WAS EFFECTIVE UNDER S 96(2)(c)(i) OF THE RTA

[21] The sixth condition concerns s 96(2)(a)–(c) of the RTA. In respect of s 96(2)(c)(i) of the RTA, an insurer is not liable under of the RTA when the following two matters are present ('two prerequisites'):

(a) before the happening of the event which gives rise to the liability of an insured under an insurance policy ('insured event'), the policy has been was cancelled by mutual consent; *and*

(b) before the happening of the insured event:

(i) the insurance certificate ('insurance certificate') has been surrendered to the insurer; *or*

(ii) the person to whom the policy is delivered makes a statutory declaration stating that the insurance certificate has been lost or destroyed;

[22] I am of the view that an insurer has the evidential burden under s 103 of the Evidence Act 1950 ('the EA') to prove a particular fact, namely the two prerequisites are present so as to enable the insurer to avoid liability under s 96(2)(c)(i) of the RTA.

[23] I am satisfied that the defendant has discharged the evidential onus under s 103 of the EA to prove successfully the existence of the two prerequisites. I have arrived at this decision based on the following evidence and reasons:

(a) the documents (cancellation of policy) clearly proved that the cancellation (policy) was effective from 28 October 2014. Hence, the cancellation (policy) took place before the happening of the insured event (accident) on 26 December 2014;

(b) the deponent of the defendant's affidavit (court encl No 11), Puan Sufaizah bt Abdul Shukor (a manager of the defendant) had deposed in

sub-paras 7(a) and (b) that on 28 October 2014, the deceased had delivered, among others, the insurance certificate to the defendant ('defendant's averment'). I accept the defendant's averment which is supported by the documents (cancellation of policy).

I have not overlooked sub-para 7(d) of the plaintiff's affidavit (court enclosure No 10) which alleged that the deceased had not handed the insurance certificate to the defendant ('plaintiff's averment'). I cannot give any credence to the plaintiff's averment because:

(i) between the plaintiff's averment and the documents (cancellation of policy), I readily accept the latter; and

(ii) in the Federal Court case of *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1, at [30], Zulkefli Ahmad Makinudin CJ (Malaya) (as he then was) has decided as follows regarding a bare assertion in an affidavit (such as the plaintiff's averment):

> [30] ... *The Court of Appeal however held that the plaintiff should have filed an affidavit to oppose the application to amend which the plaintiff failed to do. With respect in our view the Court of Appeal erred on this point again. This is because the defendant's affidavit in support of its application to amend contained nothing more than a bare assertion. A bare assertion carries no evidential value and hence, there is nothing to reply (see the case of Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 1 MLJ 12; [1993] 1 CLJ 261, SC) ... (Emphasis added.)

(c) only the deceased or his representative (not the plaintiff) is able to dispute the truth of:

(d) the contents of the documents (cancellation of policy); and

(e) the defendant's averment.

[24] The cases relied on by the plaintiff's learned counsel could be easily distinguished from this case because in those cases:

(a) there were no documents to prove the surrender of the insurance policies in question; and/or

(b) the insured persons in those cases had disputed the surrender of their insurance policies.

[25] Based on proof of the two prerequisites, on this ground alone encl 7 should be allowed with costs pursuant to s 96(2)(c)(i) of the RTA.

A VALIDITY OF INTERLOCUTORY JUDGMENT (LIABILITY SUIT) AND FINAL JUDGMENT (LIABILITY SUIT)

[26] According to the seventh condition, an insurer can only be liable under s 96 of the RTA if a victim of a tort committed by an insured has obtained a valid judgment against the insured. I will now discuss whether the interlocutory judgment (liability suit) and final judgment (liability suit) are valid against the deceased.

Is O 15 r 7(2) of the RC a mandatory provision?

[27] I reproduce below O 15 rr 6A(1), (3), 7(1), (2) and 9(1) of the RC:

> O *15 r 6A Proceedings against estates*
>
> (1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.
>
> ...
>
> (3) *An action purporting to have been commenced against a person shall be treated, if he was dead at its commencement, as having been commenced against his estate in accordance with paragraph (1)*, whether or not a grant of probate or administration was made before its commencement.
>
> ...
>
> r 7 *Change of parties by reason of death*
>
> (1) *Where a party to an action dies* or becomes bankrupt *but the cause of action survives, the action shall not abate by reason of the death* or bankruptcy.
>
> (2) *Where at any stage of the proceedings in any cause or matter the* interest or *liability of any party* is assigned or transmitted to or *devolves upon some other person, the Court may, if it thinks it is necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first-mentioned party. An application for an order under this paragraph may be made ex parte.*
>
> ...
>
> r 9(1) *If after the death of a* plaintiff or *defendant in any action the cause of action survives, but no order under r 7 is made substituting* as plaintiff any person in whom the cause of action vests or, as the case may be, *the personal representatives of the deceased defendant, the defendant* or, as the case may be, *those representatives may apply to the Court for an order that unless the action is proceeded with within such time as may be specified in the order the action shall be struck out as against the* plaintiff or *defendant*, as the case may be, *who has died*; but where it is the plaintiff who has died, the Court shall not make an order under this rule unless satisfied that due notice of the application has been given to the personal representatives (if any) of the

deceased plaintiff and to any other interested persons who, in the opinion of the Court, shall be notified. (Emphasis added.)

[28] The defendant's learned counsel has contended that upon the death of the deceased, the plaintiff should have applied to court under O 15 r 6A of the RC for an order to substitute the deceased's estate in place of the deceased as a co-defendant in the liability suit. I accept the plaintiff's submission that O 15 r 6A of the RC is only applicable if a party dies *before* the commencement of a suit. This is clear from the wording of O 15 r 6A(3) of the RC. Hence, O 15 r 6A of the RC cannot apply in this case.

[29] If an action has been filed and a plaintiff or defendant (plaintiff/defendant) dies during the pendency of the action, O 15 r 7(2) of the RC is applicable. I rely on a judgment of the Supreme Court in *Government Of Malaysia & Anor v Taib Bin Abdul Rahman* [1991] 2 MLJ 174 ('Taib'). *Taib* concerns O 8 r 7(2) of the Subordinate Courts Rules 1980 which is in pari materia with O 15 r 7(2) of the RC. In *Taib*, at pp 176–177, Mohd Azmi SCJ delivered the following judgment:

> *In this rule the words 'devolves upon some other person' are used. According to Stroud's Judicial Dictionary (4th Ed), 'To 'devolve' means to pass from a person dying to a person living, the etymology of the word shows its meaning' (per Leach MR, Parr v Parr 2 LJ Ch 167). In our case on the death of the plaintiff the interest of the deceased in the suit devolves upon the applicant.*
>
> *I am of the opinion that the use of the word 'person' shows that persons other than the personal representative can be appointed by the court to continue a pending suit. If it is the intention of the legislature that only personal representatives can be appointed the draftsman would have used the words 'personal representative' to avoid any ambiguity. The meaning of the word 'person' becomes clearer when read with r 9(1) of the Rules ...*
>
> ...
>
> *In r 9(1) the words 'but no order under rule 7 is made substituting as plaintiff any person in whom the cause of action vests' are used. And the use of the words 'any person' emphasized by me rather than the words 'personal representative' as used in respect of a deceased defendant clearly shows that there is a distinction between the meaning of the words 'person' and 'personal representative'. The meaning of the word 'person' in this r 9(1) means any person.*
>
> *Further the later part of r 9(1) provides that, '... due notice of the application has been given to the personal representatives (if any) of the deceased plaintiff and to any other interested persons ...'. This also supports my opinion that the word 'person' in r 7 means a person who is not a personal representative can be appointed for the purpose of r 7.*
>
> *I am of the view that O 8 r 7(2) does not refer to personal representatives but refers to a person. I am of the opinion that this rule is not concerned with the capacity of a person. It merely gives the court power to appoint any person to proceed with a pending suit when*

a party dies rather than leave the matter hanging until letters of administration or probate is granted.

I disagree with appellants' contention that because s 39 of the Probate and Administration Act which provides that all property of a person dies intestate until administration is granted vests in the Official Administrator and as such the Official Administrator is the proper and capable person to apply.

We are equally in agreement with the reasons discussed by the learned president. We need only to add that although under s 39 of the Probate and Administration Act 1959, the interests of the deceased plaintiff vest in the Official Administrator (since he died intestate), it does not mean that pending an order for a grant of administration, only the Official Administrator could make an application to be made a party under O 8 r 7(2). In our opinion, such an interpretation would defeat the very object of r 7(2) which is to avoid delay in the disposal of cases where the interests or liabilities of any party to a pending proceeding vest temporarily upon some other person, such as the Official Administrator. In our view the narrow interpretation advocated by learned counsel for the appellants has its root in the misinterpretation of the word 'other person' in the latter part of r 7(2) as referring to the words 'some other person' in the earlier part of the provision.

In our opinion, in order to give effect to the principal object of the rule, which is to avoid delay in the disposal of cases, the word 'that' immediately preceding the word 'other person' should be read merely as a relative or conjunctive adverb. In short, when the property or interest of an estate devolves or vests by virtue of s 39 in some other persons — in this case the Official Administrator, 'the Court may order that other person (ie person other than the Official Administrator) to be made a party to the cause or matter'. It seems clear that the word 'that' should not be read as a demonstrative pronoun referring to the earlier mentioned 'some other person' upon whom the interest or liability of a party devolves or vests but should be read as mere conjunction introducing the words 'other person'.

Thus, it is our conclusion that, when at any stage of any proceedings, the plaintiff dies intestate, and his interests devolve or vest temporarily in the Official Assignee under s 39, until administration or probate is granted, the court has the discretion to order that his son or any other person be made a party under O 8 r 7(2), if the court 'thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be completely determined and adjudicated upon'. (Emphasis added.)

[30] Based on *Taib*, upon the death of a defendant in a pending suit:

(a) a plaintiff need not apply to the court hearing the suit pursuant to O 15 r 7(2) of the RC to substitute the deceased defendant with a 'personal representative' of the deceased defendant in the suit. Section 2 of the Probate and Administration Act 1959 ('the PAA') defines a 'personal representative' as follows:

> *'personal representative' means the executor*, original or by representation, or *administrator for the time being of a deceased person*, and as regards any liability for the payment of death duties includes any person who takes possession of

or intermeddles with the property of a deceased person without the authority of the personal representatives or the Court; (Emphasis added.)

Based on the above definition in s 2 of the PAA, a 'personal representative' of a deceased is the deceased's executor or administrator of the deceased's estate ('executor/administrator'); and

(b) the plaintiff can apply under O 15 r 7(2) of the RC to substitute the deceased defendant with *any person* (not necessarily the executor/administrator) to be a representative of the deceased in the suit ('representative'). The representative may be:

(c) the spouse of the deceased defendant;

(d) an adult child of the deceased defendant; or

(e) an adult brother, sister or relative of the deceased defendant.

[31] Our O 15 r 7(2) of the RC is identical to O 15 r 7(2) of the Singapore's Rules of Court ('the RC (Singapore)'). In *Teo Gim Tiong v Krishnasamy Pushpavathi (legal representative of the estate of Maran s/o Kannakasabai, deceased)* [2014] 4 SLR 15, at [42]–[50], Chao Hick Tin JA in Singapore's Court of Appeal did not agree with *Taib* and was of the view that only an executor/administrator of a deceased plaintiff/defendant (not a representative) could be a substitute of the deceased plaintiff/defendant under O 15 r 7(2) of the RC (Singapore).

[32] As a matter of stare decisis, I am bound to follow our apex court's decision in *Taib*.

[33] In any event, the plaintiff did not apply to SC to substitute the deceased with either a representative or an executor/administrator of the deceased. It is thus clear that despite the death of the deceased during the pendency of the liability suit, the plaintiff has breached O 15 r 7(2) of the RC by proceeding to obtain the interlocutory judgment (liability suit) and final judgment (liability suit).

[34] The plaintiff's learned counsel has submitted that O 15 r 7(2) of the RC is merely a directory provision because that provision employs a permissive term 'may'. With respect, I am not able to accede to this contention. On the contrary, I am of the view that O 15 r 7(2) of the RC is a mandatory provision. If otherwise, this will cause an injustice to beneficiaries of estates of deceased defendants as follows:

(a) a deceased defendant may have a meritorious defence against the plaintiff's claim ('meritorious defence'). Upon the death of the deceased defendant, if the plaintiff does not apply to substitute the deceased

defendant with the representative or executor/administrator, the meritorious defence cannot then be adduced in the suit in question;

(b) there will be no contest for the plaintiff's claim and judgment will then be entered in the action in favour of the plaintiff against the deceased defendant; and

(c) the plaintiff can enforce the judgment against the estate of the deceased defendant (to the detriment of the beneficiaries of the estate of the deceased defendant) despite the fact that the deceased defendant may have a meritorious defence.

[35] In this case, the deceased has a meritorious defence because the deceased only insured with the defendant a Perodua car bearing the registration No TY3162. A Toyota car with the registration No TY3162 was however involved in the accident. If the plaintiff had substituted the deceased with the deceased's representative or executor/administrator in the liability suit, the representative or executor/administrator could have easily adduced the above meritorious defence in SC. In such an event, the interlocutory judgment (liability suit) and final judgment (liability suit) would not have been entered by SC against the representative or executor/administrator of the deceased.

[36] I have no hesitation to find that the interlocutory judgment (liability suit) and final judgment (liability suit) are not valid against the deceased because the plaintiff has failed to comply with the mandatory provision of O 15 r 7(2) of the RC in the liability suit. Consequently, the seventh condition has not been fulfilled in this case and the defendant is therefore not liable under s 96(1) of the RTA to satisfy the final judgment (liability suit).

Had plaintiff breached second rule of natural justice in liability suit?

[37] Any judgment or order obtained against a party when the party has been deprived of his or her right to be heard before the judgment or order is pronounced, may be invalidated on the ground that the second rule of natural justice has been infringed. This is clear from the following judgments of our apex courts:

(a) the decision of Mohd. Azmi SCJ in the Supreme Court case of *Toh Seow Ngan & Ors v Toh Seak Keng & Ors* [1990] 2 MLJ 303 at p 306; and

(b) Edgar Joseph Jr FCJ's judgment in the Federal Court in *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 at pp 381–383.

[38] I am of the view that when a defendant dies in a pending suit, the defendant's right of hearing in the suit can and should be exercised by the

representative or executor/administrator of the deceased defendant. If a plaintiff fails to substitute a deceased defendant with the representative or executor/administrator of the deceased defendant under O 15 r 7(2) of the RC, any judgment or order obtained by the plaintiff against the deceased defendant is invalid because the plaintiff has deprived the representative or executor/administrator of a right to be heard in the suit.

[39] In this case, the plaintiff had contravened the second rule of natural justice in the liability suit as follows:

(a) the plaintiff had failed to substitute the deceased in the liability suit with the representative or executor/administrator of the deceased ('the plaintiff's failure'). There was no reason given for the plaintiff's failure; and

(b) the representative or executor/administrator of the deceased had a right to be heard before the interlocutory judgment (liability suit) and final judgment (liability suit) were granted by SC. Such a right had been deprived by the plaintiff's failure.

[40] In view of the plaintiff's breach of the second rule of natural justice, I find that the interlocutory judgment (liability suit) and final judgment (liability suit) are not valid against the deceased. Hence, the defendant is not bound under s 96(1) of the RTA to honour the final judgment (liability suit).

THE COURT'S DECISION

[41] Premised on the above evidence and reasons, encl 7 is allowed with costs because this recovery action:

(a) is frivolous and/or vexatious within the meaning of O 18 r 19(1)(b) of the RC; and/or

(b) constitutes an abuse of court process under O 18 r 19(1)(d) and O 92 r 4 of the RC and/or the court's inherent jurisdiction.

[42] In closing, it should be borne in mind that the contents of JPJ record (car insurance) are solely based on unverified information submitted to JPJ.

Enclosure 7 allowed with costs.

Reported by Dzulqarnain Ab Fatar